NOTE

This Microfiche meets the quality requirements of the American National Standard for Microfiche of Documents (ANSI PH5.9-1975). However, because of imperfections in the document from which it was made, it contains images that are illegible or difficult to read. The source document for this microfiche is the best copy that could be obtained prior to filming.

CIS Congressional Information Service, Washington, D.C.

101ST CONGRESS
1st Session
HOUSE OF REPRESENTATIVES
REPORT
101-189

COURT OF VETERANS APPEALS JUDGES RETIREMENT ACT

JULY 27, 1989.—Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

---

Mr. MONTGOMERY, from the Committee on Veterans' Affairs, submitted the following

REPORT

[To accompany H.R. 2727]

[Including cost estimate of the Congressional Budget Office]

The Committee on Veterans' Affairs, to whom was referred the bill (H.R. 2727) to amend title 38, United States Code, to establish a retirement and survivor benefit program for judges of the new United States Court of Veterans Appeals, and for other purposes, having considered the same, reports favorably thereon with amendments, by unanimous voice vote, and recommends that the bill as amended do pass.

The amendments (stated in terms of the page and line numbers of the introduced bill) are as follows:

Page 5, line 24, strike out "section 8331(8) of title 5" and insert in lieu thereof "section 8331(8) or 8401(a) of title 5, whichever applies,".

Page 7, line 13, strike out "apply," and insert in lieu thereof "apply".

Page 8, line 6, strike out "subparagraph (D) of this paragraph is" and insert in lieu thereof "subparagraphs (C) and (D) of this paragraph are".

Page 9, line 19, strike out "DEFINITIONS.—".

Page 21, beginning on line 13, strike out "Amount deposited by or deducted and withheld from the salary of a judge" and insert in lieu thereof "Amounts deposited by, or deducted and witheld from the salary and retired pay of, a judge".

Strike out section 201 (page 24, line 19 through page 25, line 10).

99-836 O

H763-8

Strike out section 202 (page 25, line 11 through page 26, line 3) and insert in lieu thereof the following:

SEC. 201. FACILITIES FOR THE COURT.

(a) SPACE IN THE DISTRICT OF COLUMBIA.—The Administrator of General Services shall provide suitable building space in the District of Columbia for the United States Court of Veterans Appeals as the Court's principal place of business. The Administrator shall, if necessary, arrange for temporary space for the Court if permanent space is not immediately available for the Court. The Administrator shall place a high priority on the provision of such temporary and permanent space for the Court.

(b) APPROVAL BY COURT.—Any space to be provided for the Court of Veterans Appeals under subsection (a) must be acceptable to the Court.

(c) ADDITIONAL REQUIREMENT.—Any building space provided to the Court under subsection (a) shall be adjacent to additional building space (in an amount acceptable to the Court) that can be made available to the Court in the future if needed for expansion of the facilities of the Court.

Page 26, line 4, strike out "**SEC. 203.**" and insert in lieu thereof "**SEC. 202.**".

Strike out section 204 (page 26, lines 17 through 21) and insert in lieu thereof the following:

SEC. 203. INTERIM RULES OF THE COURT.

The Federal Rules of Appellate Procedure (28 U.S.C. App.) shall be the interim rules of the United States Court of Veterans Appeals unless otherwise provided by the Court in accordance with chapter 72 of title 38, United States Code. If there is a conflict between a provision of the Federal Rules of Appellate Procedure and the procedures set forth in chapter 72 of title 38, United States Code, the procedures set forth in such chapter shall apply.

Strike out section 205 (page 26, line 22 through page 27, line 25) and insert in lieu thereof the following:

SEC. 204. EMPLOYEES OF THE COURT.

(a) EMPLOYMENT AUTHORITY.—Section 4081 of title 38, United States Code, is amended to read as follows:

"**§ 4081. Employees**

"(a) The Court of Veterans Appeals may appoint a clerk without regard to the provisions of title 5 governing appointments in the competitive service. The clerk shall serve at the pleasure of the Court.

"(b) The judges of the Court may appoint law clerks and secretaries, in such numbers as the Court may approve, without regard to the provisions of title 5 governing appointments in the competitive service. Any such law clerk or secretary shall serve at the pleasure of the appointing judge.

"(c) The clerk, with the approval of the Court, may appoint necessary deputies and employees without regard to

the provisions of title 5 governing appointments in the competitive service.

"(d) The Court may fix and adjust the rates of basic pay for the clerk and other employees of the Court without regard to the provisions of chapter 51, subchapter III of chapter 53, or section 5373 of title 5. To the maximum extent feasible, the Court shall compensate employees at rates consistent with those for employees holding comparable positions in the judicial branch.

"(e) In making appointments under subsections (a) through (c) of this section, preference shall be given, among equally qualified persons, to persons who are preference eligibles (as defined in section 2108(3) of title 5).

"(f) The Court may procure the services of experts and consultants under section 3109 of title 5.

"(g) The Chief Judge of the Court may exercise the authority of the Court under this section whenever there are not at least two associate judges of the Court.

"(h) The Court shall not be considered to be an agency within the meaning of section 3132(a)(1) of title 5.".

(b) LIMITATION ON CONVERSION OF EMPLOYEES TO COMPETITIVE SERVICE.—Notwithstanding clause (1)(A) of the proviso under the heading "Court of Veterans Appeals" in chapter XI of Public Law 101-45, no employee of the United States Court of Veterans Appeals may be converted to the competitive service without the approval of the Court.

(c) EFFECTIVE DATE.—Notwithstanding section 401 of the Veterans' Judicial Review Act, the authority provided by section 4081 of title 38, United States Code, as amended by subsection (a), shall take effect on the date of the enactment of this Act.

Strike out section 403 (page 30, lines 3 through 16).

Page 9, line 6, insert "on the Court" after "for service".

Page 24, line 4, strike out "(e)" and insert in lieu thereof "(f)".

INTRODUCTION

On November 18, 1988, the President signed Public law 100-687. Division A of that legislation established a new United States Court of Veterans Appeals, which is to begin operation on September 1, 1989.

On June 22, 1989, the Chairman and Ranking Minority Member of the Committee introduced H.R. 2727 to provide a retirement and survivors' annuity program for judges who serve on the Court.

On July 13, 1989, the full Committee met and unanimously approved H.R. 2727, as amended, and ordered the bill reported to the House.

BACKGROUND

During the closing days of the 100th Congress, the House of Representatives passed a bill (H.R. 5288) to establish an independent Court of Veterans Appeals. Earlier in the year, the Senate passed S. 11, which provided for judicial review of veterans claims in the

United States district courts. In subsequent negotiations with the Senate on S. 11, a compromise was reached establishing the United States Court of Veterans Appeals, on which up to seven judges will serve. This legislation calls for the judges of the Court to be paid at the same salary rate as a United States district court judge, with the compensation for the chief judge fixed at the rate payable to a United States appellate court judge. Since there was insufficient time to address the need for a retirement plan comparable to that available to other Federal judges, no special provision was included in the bill with respect to this topic. As a result, judges are presently subject to the retirement plan provisions which are generally applicable to other Federal employees.

In order to insure that service on the United States Court of Veterans Appeals is as attractive to prospective judges as service in other Federal judicial capacities, the Committee has determined that a retirement and survivors' annuity plan comparable to that available to other Federal judges is desirable. The Committee examined the retirement and survivor annuity plans provided to judges who serve on Article III courts (the district courts, the Courts of Appeal, and the Supreme Court), the United States Tax Court, the United States Court of Military Appeals, and bankruptcy judges and United States magistrates. Since it is the Committee's desire that the Court of Veterans Appeals be commensurate in stature with other Federal courts, the Committee decided to establish a comparable retirement and survivor annuity benefit plan.

Summary and Discussion

The reported bill would establish a retirement and survivors' annuity program for judges of the United States Court of Veterans Appeals comparable to that afforded to other Federal judges and magistrates. The principal features of the retirement program are as follows:

(1) Each judge would be required to make an election to participate in the retirement plan provided for in this legislation. The election may be made at any time while the individual is serving as a judge. A judge would not have a vested right to receive benefits (other than disability benefits) until meeting the age and service requirements described in paragraph 2. Until a judge makes an election to participate in the retirement plan provided by this legislation, the provisions of the civil service retirement program set out in chapters 83 and 84 of title 5, United States Code, would be applicable to service as a judge of the Court.

(2) The bill would provide a retirement benefit equal to the salary in effect at the time of retirement to judges who have reached age 65 and served on the Court at least 15 years. A judge who is over 65 and who has at least ten, but less than 15, years of service would be eligible for this benefit if the sum of the judge's years of service and attained age is 80 or greater. A judge who is not reappointed following the expiration of the term for which appointed and who has served at least 15 years would also be eligible for this benefit.

(3) The bill would provide a disability retirement benefit to judges who become permanently disabled and as a result of that

disability are unable to perform the duties of the office. A judge who is disabled and who has served more than 10 years would receive a benefit equal to the salary in effect at the time of retirement. A judge who is disabled and has served less than ten years would be entitled to one-half of the rate of pay in effect at the time of retirement.

(4) A one-percent deduction would be made from the salary of a judge who elects to participate in the retirement plan. This amount would be deposited in a retirement and annuity fund established by this legislation. In order to receive credit for any period of service as a judge prior to the election to participate in the plan, a judge must deposit an amount equal to one percent of the salary received for that service. Deductions would terminate upon the retirement of the judge or upon the completion of 15 years of service for which contributions or deposits have been made.

(5) A judge who elects to participate in the retirement plan would be barred from receiving any other payment under the civil service retirement laws regardless of whether such service is performed before or after service as a judge. Following the election to participate in the court retirement plan, no further deductions would be made from the judge's salary for purposes of the civil service retirement fund, and the judge would be entitled to a lump-sum refund of all prior deductions.

The principal features of the survivors' annuity plan are as follows:

(1) A judge would be required to make an election to provide a survivor annuity under this legislation. An election to participate in this plan would be a waiver of all benefits under the civil service retirement laws, but a surviving spouse who is eligible for an annuity under any other law would be entitled to that annuity. However, service used in the computation of an annuity under this law would not be used in calculating the annuity under the other law.

(2) The bill provides that once an election to provide a survivors' annuity is made, a deduction of 3.5 percent of all future salary and retirement benefits would be made for deposit in the retirement and annuity trust fund. In addition, a judge would be required to deposit in the fund, with interest, a sum equal to 3.5 percent of previous salary earned as a judge, Member of Congress, and for other Federal civilian service. A judge would be permitted to make the deposit in installments during the judge's period of service. If the required deposit is not made, and if no deduction had been made under the civil service retirement laws, the annuity of the surviving spouse would be reduced by an amount equal to 10 percent of the amount of the unmade deposit, unless the spouse chooses to disregard that period of service for purposes of calculating the annuity due. No deposit would be necessary for any year in which deductions from the judge's salary, or a deposit, were actually made (and not withdrawn) under the civil service retirement laws.

(3) The survivors annuity would be payable only if the judge had rendered five years of civilian service and if the deduction described in paragraphs 1 and 2 (or a comparable deduction under the civil service retirement laws) had been made for at least 5 years of service as a judge or other allowable civilian service.

(4) For purposes of calculating the amount of the annuity for a surviving spouse, civilian service described in section 8332 of title 5 (generally, all Federal government service), service as a Member of Congress, and up to five years service in the Armed Forces may be creditable if a judge makes the contributions described in paragraph 2 (3.5 percent of the compensation received for civilian service or for service as a Member of Congress).

(5) A surviving spouse's annuity would be calculated by adding the following two products:

(a) 1.5 percent of the judge's average annual salary multiplied by the number of years of judicial service, allowable service as a Member of Congress, allowable service as a member of the Armed Forces (up to five years), and up to 15 years of service as a congressional employee;

(b) .75 percent of the judge's average annual salary multiplied by the years of allowable Federal service not counted in subparagraph (a).

An annuity may not exceed 50 percent of the judge's average annual salary and may not be less than 25 percent of such salary. A judge's average annual salary would be calculated by taking the three consecutive years in which the judge received the highest average annual salary, regardless of whether the three years were judicial service or other allowable service.

(6) Whenever the salaries of Court of Veterans Appeals judges are increased, the amount of an annuity which is based in whole or in part upon a deceased judge having rendered some portion of that judge's final 18 months of service as a judge of the Court shall also be increased by an amount equal to 3 percent of the annuity for each full 5 percent by which the salary is increased.

(7) The spouse of a judge who is survived by a dependent child or children would be entitled to an immediate annuity calculated in the manner described above. An additional annuity of 10 percent of the judge's average annual salary would be payable on behalf of a dependent child; if there is more than one dependent child, the additional annuity payable would be equal to 20 percent of such salary. The spouse of a judge who is not survived by a dependent child would not be eligible for annuity payments until attaining the age of 50 years.

(8) If the judge is not survived by an eligible spouse but is survived by a dependent child or children, an annuity would be payable on behalf of each such child. The amount of the annuity would be equal to the lesser of 20 percent of the judge's average annual salary or 40 percent of such salary divided by the number of such children. The annuity would be payable until the child reaches age 18 or, in the case of a full-time student, age 22. A child who becomes incapable of self-support because of physical or mental disability incurred before age 18 would be entitled to an annuity regardless of age.

(9) If a judge dies in office before having rendered 5 years of service or without a survivor or survivors entitled to an annuity, the amount contributed by the judge may be paid to other beneficiaries designated by the judge, to certain relatives of the judge, or to the estate of the judge.

The bill also includes provisions to establish a separate retirement fund for payment of retired pay and annuities and requires the Secretary of the Treasury to invest portions of the fund which are not immediately required for payments from the fund in interest-bearing securities of the United States. The bill would require that annuities be paid on the first business day of each month, and exempts the moneys payable from assignment, execution, levy, attachment, garnishment, or other legal process. It also would authorize appropriations for any unfunded liability of the fund, which is defined by reference to the present value of amounts payable and future deductions and the balance of the fund.

The bill would revise the Court's authority to appoint, classify and remove employees. When the legislation establishing the Court of Veterans Appeals was originally considered, the Committee understood that certain provisions of the civil service laws governing appointment and classification of employees might pose problems for an independent court. Therefore, section 4081 of title 38 provides that the Court may classify employee positions without regard to title 5, which governs the civil service. In a letter dated July 12, 1989, which is reprinted later in this report, the Chief Judge-designee of the United States Court of Veterans Appeals advised the Committee of the problems which he believes are inherent in any requirement that Court personnel procedures conform to those of other Federal agencies.

Accordingly, the bill would provide greater flexibility to the Court in fixing and adjusting rates of basic pay for the clerk and other employees of the Court. In addition, the clerk, who would be appointed by the Court, and law clerks or secretaries who would be appointed by the individual judges would serve at the pleasure of the respective appointing authority.

The legislation would require the Court to compensate employees in a manner consistent with comparable practices in the judicial branch to the maximum extent feasible, and would require that veterans preference be afforded to qualified individuals. It is the committee's understanding and intent that other provisions of title 5 pertaining to compensation for work injuries (chapter 81), unemployment compensation (chapter 85), retirement (chapters 83 and 84), life insurance (chapter 87), health insurance (chapter 89), and conflict of interest rules (chapter 91) would continue to apply to such employees.

As introduced, the bill would have authorized the transfer of funds from certain revolving funds administered by the Secretary of Veterans Affairs to the Court of Veterans Appeals for the initial startup costs and operation of the Court. In light of the enactment of Public Law 100–45, which appropriated $3.1 million to the Court for such purposes, this provision has been deleted from the bill.

As introduced, the bill would have required the head of the General Services Administration (GSA), in the event that GSA acquired the right to operate space in the Post Office Building adjacent to Union Station in the District of Columbia, to provide for approximately 30,000 square feet of office space in that building for the Court. The Committee was requested by the Chief Judge-designee of the Court of Veterans Appeals to make the provision discretionary. In addition, the Secretary of Labor expressed the view that

efforts to find suitable quarters for the Bureau of Labor Statistics would be delayed by many months were the Court to be located in the Post Office Building. The views of the Chief Judge-designee and the Secretary of Labor can be found later in the report under "Administration Views." The reported bill is not specific as to where the Court should be housed; instead, it requires the Administrator of General Services to give the highest priority to the provision of temporary and permanent space for the Court.

Section-by-Section Analysis

Section 101 of the reported bill would add a new subchapter V to chapter 72 of title 38, United States Code, entitled "Retirement and Survivor Annuities". Chapter 72 was added to title 38 by Public Law 100-687 and established the United States Court of Veterans Appeals. The new subchapter would have three sections: section 4096 provides for a retirement benefit for judges; section 4097 provides a survivor annuity plan for dependents of deceased judges; and section 4098 governs the establishment of a new retirement fund. The effect of the retirement and survivors' annuity program are as described in the "Summary and Discussion" section of this report.

Section 102 makes conforming amendments to sections 8334(i) and section 8402 of title 5, United States Code, to provide that judges who elect to participate in the retirement program established by this legislation need not make contributions and deductions under the applicable civil service retirement laws. This section also amends section 4053 of title 38, United States Code, to strike a provision governing the removal of a judge by the President for physical or mental disability. This provision is inconsistent with the proposed section 4096(g), which provides that the President may declare a judge retired if the judge has become permanently disabled and as a result of that disability is unable to perform the duties of the office.

Section 201 of the bill would direct the Administrator of General Services to provide space to the Court of Veterans Appeals on a priority basis.

Section 202 of the bill would allow certain persons who are eligible, by virtue of having filed a notice of disagreement with an appealable Department of Veterans Affairs decision after November 17, 1988, to obtain review of an adverse decision. Under existing law (38 U.S.C. 4066), in order to obtain review by the Court of Veterans Appeals, a person adversely affected by a final decision of the Board of Veterans' Appeals must file a notice of appeal within 120 days after the date on which the decision of the Board is mailed to the person. Since it is uncertain whether the Court of Veterans Appeals will commence operations in time for certain claimants to timely file a notice of appeal, section 202 would extend the 120-day period until 30 days after the Court publishes a notice in the Federal Register that it has commenced operations.

Section 203 would provide that the Federal Rules of Appellate Procedure shall be the interim rules of the Court, to the extent not inconsistent with procedures set forth in the law establishing the

Court, until the Court prescribes its own rules of practice and procedure as authorized by chapter 72 of title 38, United States Code.

Section 204 would revise section 4081 of title 38, United States Code, which authorizes the Court of Veterans Appeals to appoint employees in accordance with the provisions of title 5 and to fix compensation of such employees in accordance with subchapter 53 of title 5. As revised, section 4081 would authorize the Court to appoint a clerk, who would serve at the pleasure of the Court without regard to the provisions of title 5 governing appointments in the civil service. Section 4081 would also authorize individual judges to appoint law clerks and secretaries without regard to such provisions. These clerks and secretaries would also serve at the pleasure of the judge. The clerk would also be authorized to appoint other deputies and employees without regard to the provisions of title 5. The Court would be authorized to fix and adjust the rates of pay for employees without regard to title 5 provisions; however, to the maximum extent feasible, the Court would be required to compensate employees at rates consistent with rates for employees holding comparable positions in the judicial branch.

In making appointments under this section, the Court would be required to give preference among equally qualified persons to veterans and other preference eligibles as defined in title 5. This section would also limit the right of employees appointed under the interim authority provided to the Court by Public Law 101–45, the dire emergency supplemental appropriations Act, by providing that any right to convert to the competitive service would be subject to the approval of the Court.

Section 301 would make a technical correction in section 401(d) of the Veterans' Judicial Review Act to postpone the effective date of a change in the procedure for reopening disallowed claims to make the effective date coincide with the effective date of section 103(a) of the Act. Both section 103(a) and section 204 of the Act deal with the topic of reopening claims disallowed by the Board of Veterans' Appeals and the changes made by these two sections should have the same effective date.

Section 302 would make several amendments to correct duplicate section numbers, include necessary cross-references, and eliminate language inconsistent with the traditional powers of a court.

Section 401 would amend section 12 of the Department of Veterans Affairs Act to make it clear that the Secretary is authorized to consider political activity or affiliation in appointing certain persons to certain confidential or policy-determining positions in the new Department of Veterans Affairs. This amendment was suggested by the Department's General Counsel to clarify the original Congressional intent, which was to permit such appointments to a very limited number of positions in the new Department.

Section 402 would clarify the chain of command for the Court in the event of a vacancy in the position of chief judge of the Court.

Section 403 would grant the Court the authority to procure the services of experts or consultants, authority which is routinely granted to all Federal agencies.

Oversight Findings

No oversight findings have been submitted to the Committee by the Committee on Government Operations.

CBO Cost Estimate

The following letter was received by the Committee on the cost of the reported bill:

U.S. Congress,
Congressional Budget Office,
Washington, D.C., July 12, 1989.

Hon. G. V. (Sonny) Montgomery, *Chairman,*
Committee on Veterans' Affairs,
U.S. House of Representatives,
Washington, D.C. 20515

Dear Mr. Chairman: The Congressional Budget Office has reviewed H.R. 2727, as introduced in the House of Representatives. This bill would create a retirement system for veterans appeals judges. The new system would provide judges with a retirement benefit equal to their final salary. CBO estimates that enactment of H.R. 2727 would not significantly affect federal revenues or outlays through fiscal year 1994.

The election to participate in the Court retirement system could be made at any time while the individual is serving as a judge. If a judge is already covered under the civil service retirement system, his or her service would continue to be covered under that system until the judge elects to participate in the Court retirement plan. Upon electing to participate in the Court retirement plan, a judge would be required to deposit in the Court retirement fund contributions for any period of judicial service prior to the election to participate. The judge would then be entitled to a lump-sum refund of all prior civil service payroll contributions.

According to information from the Committee on Veterans' Affairs, there would be a maximum of 7 veterans appeals judges. To meet the minimum retirement requirements, a judge would have to be 65 and work in the Court of Veterans Appeals for 15 years or, if the judge is over 65 and has worked in the Court of Veterans Appeals for at least 10 years, the sum of the judge's years of service and attained age must be 80 or greater. A judge who becomes disabled could retire before meeting the minimum age and service requirements. This estimate assumes no retirement benefits would be paid over the projection period because no judge could meet the minimum service requirements stated above. Outlays could be positive if disability retirement benefits were paid over the period.

The bill would also allow judges choosing the new retirement system to participate in the survivors annuity plan. A survivors annuity would be payable only if the judge had at least five years of civilian service. This estimate assumes no survivor benefits would be paid over the projection period.

This new retirement system would be funded by contributions from judges' salaries and by federal government payments to eliminate any unfunded liability created by the new system. A one percent deduction would be taken from the salary of each participat-

ing judge. Judges choosing to participate in the survivors annuity plan would have an additional 3.5 percent deducted from their salaries. Revenues to the federal government would vary depending on how judges' contributions to the Court retirement and survivors annuity plans differ from the contributions they otherwise would have made to the Federal Employee's Retirement System.

Federal payments to eliminate any unfunded liability would be made through annual appropriations. These payments would be intrabudgetary and would be offset within the budget, having no direct effect on federal outlays.

If you wish further details on this estimate, we will be pleased to provide them. The CBO staff contact is Cathy Ellman (226-2820).

Sincerely,

ROBERT D. REISCHAUER,
Director.

INFLATIONARY IMPACT STATEMENT

The reported bill would have no inflationary impact.

ADMINISTRATION VIEWS

The following views were received by the Committee on H.R. 2727:

EXECUTIVE OFFICE OF THE PRESIDENT
OFFICE OF MANAGEMENT AND BUDGET
WASHINGTON, D.C. 20503

July 12, 1989

Honorable G.V. Montgomery
Chairman
Committee on Veterans' Affairs
U.S. House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

This is in reply to your Committee's request for the views of this Office on H.R. 2727, the "Court of Veterans Appeals Judges Retirement Act."

Title I of the bill would establish an optional, special retirement and survivor benefits plan for the seven judges of the new Court of Veterans Appeals. This system would be in lieu of the coverage available to the judges under the Federal Employees' Retirement System (FERS) or the Civil Service Retirement System (CSRS).

The special retirement plan proposed by Title I is patterned after the special systems established by law for judges of the U.S. Tax Court and for Bankruptcy Judges and Magistrates. There are, however, a number of technical defects which have been identified by the Departments of Labor and the Treasury, and by the Administrative Office of the United States Courts in letters to this Office. We are enclosing for Committee consideration excerpts from those letters which discuss changes needed to improve the special plan. We would also point out that Title I contains no provision for annuity benefits for former spouses of Court of Veterans Appeals judges. Such benefits are currently provided in the recently-enacted retirement system (Public Law 100-659) for Bankruptcy Judges and Magistrates, approved November 15, 1988, and in the military retirement system as well as FERS and CSRS. We believe the Committee should consider incorporating a provision for former spouses in Title I of the bill.

With respect to the cost of the new retirement system, for fiscal years 1990 to 1994, we estimate that there will be no budget outlays from the Court of Veterans Appeals Retirement Fund for annuity benefits. This assumes that none of the newly-appointed judges will retire during this time.

There could, however, be budget authority and intragovernmental outlays for the Court's retirement system beginning as early as FY 1990. Proposed Section 4098(e)(2)(A) of title 38, United States Code, would require the Court to transfer an amount to the Treasury sufficient to eliminate any unfunded liability of the Fund. Given that the Veterans Appeals Court judges' contribution under the bill would be only one percent of pay, and retirement annuities could equal full salary, the annual amount needed to eliminate the Fund's unfunded liability will depend on how many of the Veterans Appeals Court judges elect benefits under this bill. Since only one of the judges has been confirmed to date, any estimate of the cost at this time would be conjecture.

Section 201 of Title II would require the transfer of up to $3.1 million from other accounts of the Department of Veterans Affairs to the new Court. This provision has been overtaken by approval on June 30,1989, of Public Law 101-45, making supplemental appropriations for the Department. That law provides $3.1 million for the Court. Accordingly, we recommend that section 201 of the bill be deleted.

Section 202 of Title II would direct the General Services Administration (GSA) to acquire space for the Court in the Old Post Office building adjacent to Union Station. Section 202 is contrary to GSA's basic statutory authority to assign space in government-owned or leased buildings. It also would undo ongoing and longstanding negotiations for use of the Old Post Office space for the Bureau of Labor Statistics. Section 202 is strongly opposed by GSA in its memorandum to this Office (copy enclosed) and by the Department of Labor in the letter it is sending to your Committee. We concur in the views expressed by these agencies and, accordingly, recommend that section 202 be deleted or modified in a manner to meet the objections of GSA and the Department of Labor.

Other provisions of the bill address such matters as expedited hiring authority for the court, rules of procedure, and certain technical corrections in the laws establishing the Court and the Department.

Subject to the deletion of Section 201 and the deletion or acceptable modification of Section 202, and to the Committee's consideration of technical comments on the retirement plan, the Administration would support the enactment of H.R. 2727.

Cordially,

William M. Diefenderfer III
Deputy Director

Enclosures

United States
Office of Government Ethics
P.O. Box 14108
Washington, D.C. 20044

By Hand

July 12, 1989

The Honorable G. V. (Sonny) Montgomery
Chairman
Committee on Veterans' Affairs
United States House of Representatives
335 Cannon House Office Building
Washington, D.C. 20515

Dear Mr. Chairman:

I wish to offer my comments on the proposed "Court of Veterans Appeals Judges Retirement Act" bill that Senator Cranston forwarded to me. I understand that the bill is on a very fast track, so I have prepared these comments on an expedited basis. If there is a further opportunity for comment, I would be pleased to expand on these remarks.

Before commenting on the proposed legislation, I wish to renew my plea that 38 U. S. Code § 4053 be modified to provide for the traditional parity of salary at the circuit judge level for associate judges of the United States Court of Veterans Appeals.

As far as the proposed "Court of Veterans Appeals Judges Retirement Act" is concerned, I have reservations or comments about only three components of the bill: 1) the employment provisions for the Court (section 205); 2) the facilities for the Court (section 202); and 3) the need to provide for upward adjustment in calculations of retirement and survivor annuity pay (§ 4096).

Having consulted with the Office of Personnel Management ("OPM"), which in turn has been working closely with the Administrative Office of the United States Courts to help me develop a staffing plan for the Court, I have grave concerns about both the current and proposed provisions governing the employment of non-judicial personnel. (§ 4081 of the original legislation and section 205 of the proposed bill) For the reasons that follow, I urge that all of § 4081 following the first sentence be deleted. In that event, section 205 of the new legislation would be unnecessary, except that there would still be the need for a provision establishing the interim authority of the Chief Judge.

After considering the legislation and speaking with other courts' personnel and with OPM, I have concluded that the idea to impose the restrictions of title 5 of the United States Code, governing appointments in the competitive service, on any part of the Court's employing authority would eviscerate the Court's much-needed judicial independence and would reek havoc on the effective operation of the Court. OPM has informed me that the proposed grafting of the competitive service provisions and executive branch standards onto the Court's staffing needs would be problematic and difficult to achieve; there is simply no direct correlation between qualification standards within the executive branch and the judicial classification system - - a veritable "apples with oranges" mixture. Moreover, if the Court were to be saddled with the title 5 requirements, OPM most likely would propose that the Court be delegated examination authority to circumvent some of the difficulties of the competitive examination process. Under that scenario, the Court would be obliged to run its staffing under the training, auspices and oversight of OPM. Such a system would be costly, time-consuming, extremely burdensome, unnecessary and, most importantly, antithetical to the traditional notions of judicial independence.

Because the current law, §4081, and the proposed modification, section 205, both would render the Court subject to the control of the executive and the competitive service provisions of title 5, I must register my strong objection to subjecting the Court to treatment that would hamstring, if not cripple, its operations. I cannot think of a single virtue in having a judicial body bound by executive branch regulations and beholden to the executive branch. From my considerable judicial experience and from speaking with other courts' personnel, I am firmly convinced that unless all non-judicial personnel serve at the pleasure of the Court, it will be most difficult to operate the Court in an efficacious and efficient manner. As a judicial body, the Court needs flexibility - - not to be faced with procedural hurdle after hurdle when seeking to employ non-judicial personnel. While the proposed legislation would exempt the Court's first 35 employees from the title 5 requirements (if they were hired before December 31, 1989), that proposal does not go far enough and may even exacerbate the problem by creating two sets of employees: those who were hired outside the title 5 provisions and those who were hired subject to title 5.

I strenuously urge that § 4081 be modified so that only the first sentence of the current section remains: "The Court of Veterans Appeals may appoint such employees as may be necessary to execute the functions vested in the Court." Concomitant with the Court's authority, I recommend that the language of the Interim Authority provision, proposed section 205(d) be modified as follows and added to § 4081:

> The authority provided in this section may be exercised by the chief judge whenever there are not at least two associate judges of the Court.

My second area of concern about the proposed legislation is the requirement of section 202, entitled "Facilities for Court," that seems to require the Court to be housed in the Post Office Building adjacent to Union Station if the Administrator of the General Services Administration ("GSA") enters into a long-term lease arrangement for that space. While I understand that GSA will be commenting on section 202 of the proposed legislation, I offer my own comments on the provision. I have visited the Post Office Building in my quest to find suitable permanent quarters for the Court and have consulted with GSA about that and other locations. GSA has informed me that the Post Office Building is already totally occupied and that GSA has expended substantial sums of money to plan the space in that building.

Given the other purposes planned for the building, it appears that that location would be unsuitable for housing the Court. In any event, the ability to occupy the Post Office Building space would be years away. It is vital that the Court be housed in its permanent quarters no later than January 1, 1990, as the temporary space already arranged for the Court is makeshift at best. As a result, I recommend that section 202 be deleted from the bill. If the provision remains even though the Post Office Building space is already committed, I ask that the provision not be mandatory and instead be exercisable at the option of the Chief Judge so that my hands are not tied in starting the operations of the Court.

My third area of comment concerns Title I of the Act, the Judges Retirement and Survivor Annuity Program. In three of the sections of the bill, I feel that provisions need to be added providing for potential upward adjustments of retirement pay and survivor's annuity, similar to adjustment mechanisms in place for all other retirees and survivors. I recommend that § 4096 (c)(1) be amended by adding the following language at the end of the current provision: "subject to upward adjustment in the event of any increase in the rate of pay of the Chief Judge or the Associate Judges of the Court." For §§ 4096 (c)(2) and 4097(k)(1), I recommend that the calculations for benefits under those sections be subject to upward adjustment by inclusion of a Cost of Living Allowance. I feel that these modifications are necessary in order that the judges' benefits not be diminished by the effects of inflation.

I appreciate the opportunity to offer my observations on the proposed legislation. Please let me know if the Committee wishes me to expand on these remarks. If you or your staff members have any questions concerning these comments, please contact me or Melanie Dorsey of my legal staff at 523-5757.

Sincerely,

Frank Q. Nebeker /mcd

Frank Q. Nebeker

U.S. DEPARTMENT OF LABOR

SECRETARY OF LABOR
WASHINGTON, D.C.

JUL 12 1989

The Honorable G. V. Montgomery
Chairman
Committee on Veterans Affairs
House of Representatives
Washington, D.C. 20515

Dear Mr. Chairman:

We have reviewed H.R. 2727, Court of Veterans Appeals Judges Retirement Act. Sec. 202 of the bill directs the General Services Administration (GSA) to make available 30,000 square feet of the Post Office Building adjacent to Union Station in the District of Columbia to the Court of Veterans Appeals, along with an additional contingent expansion space. For the reasons stated below, the Department of Labor objects to this provision.

GSA and the Department have developed a comprehensive plan to consolidate the Bureau of Labor Statistics in this building. The Department has sought to consolidate BLS' national office for many years and has been working with GSA since 1977 to locate a suitable site. We have engaged in this pursuit not only because of the advantages of a consolidated national office site, but also due to continuing efforts to evict BLS personnel from three of its four present work sites. The most significant of these efforts is by the General Accounting Office to gain control over space in the GAO Building currently occupied by approximately half of the BLS national office staff. GSA and the Department, after a long search, settled some time ago upon the Post Office Building as the appropriate location.

Over the past year GSA, BLS, and contractor design staff have worked extensively to complete plans to renovate this building to meet our requirements. We understand that GSA has assigned limited space in the building to the Architect of the Capitol, the Postal Service, and the Smithsonian Institution. All of the remaining space has been allocated to the BLS. This space is just sufficient to house the BLS, with no room to spare. Moreover, the renovation plans for the building have been developed to locate and accommodate the Bureau's high technology information processing requirements and other special needs.

Thus, requisitioning this space would be far more damaging than merely displacing some BLS personnel; it would invalidate the functional plan that the BLS and GSA have already developed. If availability of this space is denied, the Department will have to commence once again the multi-year process required to obtain a suitable alternative site. In the meantime, the Bureau may be forced to cope with a series of costly and disruptive temporary moves.

Thank you for the opportunity to provide these views, which have the concurrence of GSA. An identical letter has been sent to Chairman Alan Cranston.

The Office of Management and Budget advises that, from the standpoint of the Administration's program, there is no objection to the submission of this report.

Sincerely,

Elizabeth Dole

CHANGES IN EXISTING LAW MADE BY THE BILL, AS REPORTED

In compliance with clause 3 of rule XIII of the Rules of the House of Representatives, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new matter is printed in italic, existing law in which no change is proposed is shown in roman):

TITLE 38, UNITED STATES CODE

* * * * * * *

PART I—GENERAL PROVISIONS

* * * * * * *

CHAPTER 3—VETERANS' ADMINISTRATION; OFFICERS AND EMPLOYEES

* * * * * * *

SUBCHAPTER II—ADMINISTRATOR OF VETERANS' AFFAIRS

210. Appointment and general authority of Administrator; Deputy Administrator.

* * * * * * *

[223.] *224.* Administrative settlement of tort claims.

* * * * * * *

Subchapter II—Administrator of Veterans' Affairs

* * * * * * *

§ [223.] *224.* Administrative settlement of tort claims

(a) Notwithstanding the limitations contained in section 2672 of title 28, the Administrator may settle any claim for money damages against the United States cognizable under section 1346(b) or 2672 of title 28 or section 4116 of this title to the extent the authority to do so is delegated to the Administrator by the Attorney General. Such delegation may not exceed the authority delegated by the Attorney General to United States attorneys to settle claims for money damages against the United States.

(b) For purposes of this subsection, the term "settle", with respect to a claim, means consider, ascertain, adjust, determine, and dispose of the claim, whether by full or partial allowance or by disallowance.

* * * * * * *

PART IV—GENERAL ADMINISTRATIVE PROVISIONS

* * * * * * *

CHAPTER 57—RECORDS AND INVESTIGATIONS

* * * * * * *

Subchapter I—Records

§ 3301. Confidential nature of claims

(a) * * *

(b) The Administrator shall make disclosure of such files, records, reports, and other papers and documents as are described in subsection (a) of this section as follows:

(1) To a claimant or duly authorized agent or representative of a claimant as to matters concerning the claimant alone when, in the judgment of the Administrator, such disclosure would not be injurious to the physical or mental health of the claimant and to an independent medical expert or experts for an advisory opinion pursuant to section *3009 or* 4009 of this title.

* * * * * * *

PART V—BOARDS AND DEPARTMENTS

* * * * * * *

CHAPTER 72—UNITED STATES COURT OF VETERANS APPEALS

* * * * * * *

SUBCHAPTER V—RETIREMENT AND SURVIVORS ANNUITIES

4096. Retirement of judges.
4097. Survivor annuities.
4098. Court of Veterans Appeals Retirement Fund.

* * * * * * *

Subchapter I—Organization and Jurisdiction

* * * * * * *

§ 4053. Composition

(a) * * *

* * * * * * *

(f)(1) A judge of the Court may be removed from office by the President on grounds of misconduct, neglect of duty, *or* engaging in the practice of [law, or physical or mental disability which, in the opinion of the President, prevents the proper execution of the judge's duties.] *law.* A judge of the Court may not be removed from office by the President on any other ground.

(2) Before a judge may be removed from office under this subsection, the judge shall be provided with a full specification of the reasons for the removal and an opportunity to be heard.

§ 4054. Organization

(a) * * *

* * * * * * *

(d) In the event of a vacancy in the position of chief judge of the Court, the associate judge senior in service on the Court shall serve

as acting chief judge unless the President designates one of the other associate judges to serve as acting chief judge, in which case the judge so designated shall serve as acting chief judge.

* * * * * * *

Subchapter III—Miscellaneous Provisions

[§ 4081. Employees

[The Court of Veterans Appeals may appoint such employees as may be necessary to execute the functions vested in the Court. Such appointments shall be made in accordance with the provisions of title 5 governing appointment in the competitive service, except that the Court may classify such positions based upon the classification of comparable positions in the judicial branch. The basic pay of such employees shall be fixed in accordance with subchapter III of chapter 53 of title 5.]

§ 4081. Employees

(a) The Court of Veterans Appeals may appoint a clerk without regard to the provisions of title 5 governing appointments in the competitive service. The clerk shall serve at the pleasure of the Court.

(b) The judges of the Court may appoint law clerks and secretaries, in such numbers as the Court may approve, without regard to the provisions of title 5 governing appointments in the competitive service. Any such law clerk or secretary shall serve at the pleasure of the appointing judge.

(c) The clerk, with the approval of the Court, may appoint necessary deputies and employees without regard to the provisions of title 5 governing appointments in the competitive service.

(d) The Court may fix and adjust the rates of basic pay for the clerk and other employees of the Court without regard to the provisions of chapter 51, subchapter III of chapter 53, or section 5373 of title 5. To the maximum extent feasible, the Court shall compensate employees at rates consistent with those for employees holding comparable positions in the judicial branch.

(e) In making appointments under subsections (a) through (c) of this section, preference shall be given, among equally qualified persons, to persons who are preference eligibles (as defined in section 2108(3) of title 5).

(f) The Court may procure the services of experts and consultants under section 3109 of title 5.

(g) The Chief Judge of the Court may exercise the authority of the Court under this section whenever there are not at least two associate judges of the Court.

(h) The Court shall not be considered to be an agency within the meaning of section 3132(a)(1) of title 5.

Subchapter IV—Decisions and Review

* * * * * * *

§ 4092. Review by United States Court of Appeals for the Federal Circuit

(a) * * *

* * * * * * *

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any **[**statute or**]** regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Veterans Appeals that the Court of Appeals for the Federal Circuit finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

* * * * * * *

Subchapter V—Retirement and Survivors Annuities

§ 4096. Retirement of judges

(a) For purposes of this section:

(1) The term "Court" means the United States Court of Veterans Appeals.

(2) The term "judge" means the chief judge or an associate judge of the Court.

(b)(1) A judge who meets the age and service requirements set forth in the following table may retire:

The judge has attained age:	*And the years of service as a judge are at least*
65	*15*
66	*14*
67	*13*
68	*12*
69	*11*
70	*10*

(2) A judge who is not reappointed following the expiration of the term for which appointed may retire upon the completion of that term if the judge has served as a judge of the Court for 15 years or more. In order to retire under this paragraph, a judge must, not earlier than 9 months preceding the date of the expiration of the judge's term of office and not later than 6 months preceding such date, advise the President in writing that the judge is willing to accept reappointment to the Court.

(3) A judge who becomes permanently disabled and as a result of that disability is unable to perform the duties of the office shall retire.

(c)(1) An individual who retires under subsection (b) of this section and elects under subsection (d) of this section to receive retired

pay under this subsection shall (except as provided in paragraph (2) of this subsection) receive retired pay at the rate of pay in effect at the time of retirement.

(2) An individual who serves as a judge for less than 10 years and who retires under subsection (b)(3) of this section and elects under subsection (d) of this section to receive retired pay under this subsection shall receive retired pay at a rate equal to one-half of the rate of pay in effect at the time of retirement.

(3) Retired pay under this subsection shall begin to accrue on the day following the day on which the individual's salary as judge ceases to accrue and shall continue to accrue during the remainder of the individual's life. Retired pay under this subsection shall be paid in the same manner as the salary of a judge.

(d)(1) A judge may elect to receive retired pay under subsection (c) of this section. Such an election—

(A) may be made only while an individual is a judge (except that, in the case of an individual who fails to be reappointed as judge at the expiration of a term of office, the election may be made at any time before the date after the day on which the individual's successor takes office); and

(B) may not be revoked after the retired pay begins to accrue.

(2) In the case of a judge other than the chief judge, such an election shall be made by filing notice of the election in writing with the chief judge. In the case of the chief judge, such an election shall be made by filing notice of the election in writing with the Director of the Office of Personnel Management.

(3) The chief judge shall transmit to the Director of the Office of Personnel Management a copy of each notice filed with the chief judge under this subsection.

(e) If an individual for whom an election to receive retired pay under subsection (c) is in effect accepts compensation for employment with the United States, the individual shall, to the extent of the amount of that compensation, forfeit all rights to retired pay under subsection (c) of this section for the period for which the compensation is received.

(f)(1) Except as otherwise provided in this subsection, the provisions of the civil service retirement laws (including the provisions relating to the deduction and withholding of amounts from basic pay, salary, and compensation) shall apply with respect to service as a judge as if this section had not been enacted.

(2) In the case of any individual who has filed an election to receive retired pay under subsection (c) of this section—

(A) no annuity or other payment shall be payable to any person under the civil service retirement laws with respect to any service performed by such individual (whether performed before or after such election is filed and whether performed as judge or otherwise);

(B) no deduction for purposes of the Civil Service Retirement and Disability Fund shall be made from retired pay payable to that individual under subsection (c) of this section or from any other salary, pay, or compensation payable to that individual, for any period beginning after the day on which such election is filed; and

(C) such individual shall be paid the lump-sum credit computed under section 8331(8) or 8401 (a) of title 5, whichever applies, upon making application therefor with the Office of Personnel Management.

(g)(1) A judge who becomes permanently disabled and as a result of that disability is unable to perform the duties of the office shall certify to the President in writing that such permanent disability exists. If the chief judge retires for such a disability, the retirement of the chief judge shall not take effect until concurred in by the President. If any other judge retires for such a disability, the chief judge shall furnish to the President a certificate of disability signed by the chief judge.

(2) Whenever the President finds that a judge has become permanently disabled and as a result of that disability is unable to perform the duties of the office, the President shall declare that judge to be retired. Before a judge may be retired under this paragraph, the judge shall be provided with a full specification of the reasons for the retirement and an opportunity to be heard.

(h)(1) An individual who has filed an election to receive retired pay under subsection (c) of this section may revoke such election at any time before the first day on which retired pay would (but for such revocation) begin to accrue with respect to such individual.

(2) Any revocation under this subsection shall be made by filing a notice of the election in writing with the Director of the Office of Personnel Management. The Office of Personnel Management shall transmit to the chief judge a copy of each notice filed under this subsection.

(3) In the case of a revocation under this subsection—

(A) for purposes of this section, the individual shall be treated as not having filed an election to receive retired pay under subsection (c) of this section;

(B) for purposes of section 4097 of this title—

(i) the individual shall be treated as not having filed an election under section 4097(b) of this title, and

(ii) section 4097(e) of this title shall not apply and the amount credited to such individual's account (together with interest at 3 percent per year, compounded on December 31 of each year to the date on which the revocation is filed) shall be returned to the individual;

(C) no credit shall be allowed for any service as a judge of the Court unless with respect to such service either there has been deducted and withheld the amount required by the civil service retirement laws or there has been deposited in the Civil Service Retirement and Disability Fund an amount equal to the amount so required, with interest;

(D) the Court shall deposit in the Civil Service Retirement and Disability Fund an amount equal to the additional amount it would have contributed to such Fund but for the election under subsection (d); and

(E) if subparagraphs (C) and (D) of this paragraph are complied with, service on the Court shall be treated as service with respect to which deductions and contributions had been made during the period of service.

(i)(1) Beginning with the next pay period after the Director of the Office of Personnel Management receives a notice under subsection (d) of this section that a judge has elected to receive retired pay under this section, the Director shall deduct and withhold 1 percent of the salary of such judge. Amounts shall be so deducted and withheld in a manner determined by the Director. Amounts deducted and withheld under this subsection shall be deposited in the Treasury of the United States to the credit of the Court of Veterans Appeals Judges Retirement Fund. Deductions under this subsection from the salary of a judge shall terminate upon the retirement of the judge or upon the completion of 15 years of service for which either deductions under this subsection or a deposit under subsection (j) of this section has been made, whichever occurs first.

(2) Each judge who makes an election under subsection (d) of this section shall be considered to agree to the deductions from salary which are made under paragraph (1) of this subsection.

(j) A judge who makes an election under subsection (d) of this section shall deposit, for service on the Court performed before the election for which contributions may be made under this section, an amount equal to 1 percent of the salary received for the first years, not exceeding 15 years, of that service. Retired pay may not be allowed until a deposit required by this subsection has been made.

(k) The amounts deducted and withheld under subsection (i) of this section, and the amounts deposited under subsection (j) of this section, shall be deposited in the Court of Veterans Appeals Retirement Fund for credit to individual accounts in the name of each judge from whom such amounts are received.

§ 4097. Survivor annuities

(a) For purposes of this section:

(1) The term "Court" means the United States Court of Veterans Appeals.

(2) The term "judge" means the chief judge or an associate judge of the Court.

(3) The term "pay" means salary received under section 4053(e) of this title and retired pay received under section 4096(c) of this title.

(4) The term "retirement fund" means the Court of Veterans Appeals Retirement Fund established under section 4098 of this title.

(5) The term "surviving spouse" means a surviving spouse of an individual who (A) was married to such individual for at least two years immediately preceding the individual's death, or (B) is a parent of issue by the marriage.

(6) The term "dependent child" has the meaning given the term "child" in section 376(a)(5) of title 28.

(7) The term "Member of Congress" means a Representative, a Senator, a Delegate to Congress, or the Resident Commissioner of Puerto Rico.

(b) A judge may become a participant in the annuity program under this section by filing a written election under this subsection while in office. Any such election shall be made in such manner as may be prescribed by the Court.

(c) There shall be deducted and withheld each pay period from the pay of a judge who has made an election under subsection (b) of this section a sum equal to 3.5 percent of the judge's pay. Amounts so deducted and withheld shall be deposited in the retirement fund. A judge who makes an election under subsection (b) of this section shall be considered by that election to agree to the deductions from the judge's pay required by this subsection.

(d) A judge who makes an election under subsection (b) of this section shall deposit, with interest at 3 percent per year compounded on December 31 of each year, to the credit of the retirement fund, an amount equal to 3.5 percent of the judge's pay and of the judge's basic salary, pay, or compensation for service as a Member of Congress, and for any other civilian service within the purview of section 8332 of title 5. Each such judge may elect to make such deposits in installments during the judge's period of service in such amount and under such conditions as may be determined in each instance by the chief judge. Notwithstanding the failure of a judge to make such deposit, credit shall be allowed for the service rendered, but the annual annuity of the surviving spouse of such judge shall be reduced by an amount equal to 10 percent of the amount of such deposit, computed as of the date of the death of such judge, unless the surviving spouse elects to eliminate such service entirely from credit under subsection (k) of this section. However, a deposit shall not be required from a judge for any year with respect to which deductions from the judge's pay, or a deposit, were actually made (and not withdrawn) under the civil service retirement laws.

(e) If the service of a judge who makes an election under subsection (b) of this section terminates other than pursuant to the provisions of section 4096 of this title, or if any judge ceases to be married after making the election under subsection (b) of this section and revokes (in a writing filed as provided in subsection (b) of this section) such election, the amount credited to the judge's individual account (together with interest at 3 percent per year compounded on December 31 of each year to the date of the judge's relinquishment of office) shall be returned to the judge. For the purpose of this section, the service of a judge making an election under subsection (b) of this section shall be considered to have terminated pursuant to section 4096 of this title if—

(1) the judge is not reappointed following expiration of the term for which appointed; and

(2) at or before the time of the expiration of that term, the judge is eligible for and elects to receive retired pay under section 4096 of this title.

(f)(1) If a judge who makes an election under subsection (b) of this section dies after having rendered at least 5 years of civilian service (computed as prescribed in subsection (l) of this section), for the last 5 years of which the salary deductions provided for by subsection (c) of this section or the deposits required by subsection (d) of this section have actually been made (and not withdrawn) or the salary deductions required by the civil service retirement laws have actually been made (and not withdrawn)—

(A) if the judge is survived by a surviving spouse but not by a dependent child, there shall be paid to the surviving spouse an annuity beginning with the day of the death of the judge or fol-

lowing the surviving spouse's attainment of the age of 50 years, whichever is the later, in an amount computed as provided in subsection (k) of this section; or

(B) if the judge is survived by a surviving spouse and a dependent child or children, there shall be paid to the surviving spouse an immediate annuity in an amount computed as provided in subsection (k) of this section and there shall also be paid to or on behalf of each such child an immediate annuity equal to the lesser of—

(i) 10 percent of the average annual pay of such judge (determined in accordance with subsection (k) of this section), or

(ii) 20 percent of such average annual pay, divided by the number of such children; or

(C) if the judge is not survived by a surviving spouse but is survived by a dependent child or children, there shall be paid to or on behalf of each such child an immediate annuity equal to the lesser of—

(i) 20 percent of the average annual pay of such judge (determined in accordance with subsection (k) of this section), or

(ii) 40 percent of such average annual pay, divided by the number of such children.

(2) The annuity payable to a surviving spouse under this subsection shall be terminated—

(A) upon the surviving spouse's death; or

(B) upon the remarriage of the surviving spouse before age 55.

(3) The annuity payable to a child under this subsection shall be terminated upon the child's death.

(4) In case of the death of a surviving spouse of a judge leaving a dependent child or children of the judge surviving the spouse, the annuity of such child or children under paragraph (1)(B) of this subsection shall be recomputed and paid as provided in paragraph (1)(C) of this subsection. In any case in which the annuity of a dependent child is terminated, the annuities of any remaining dependent child or children, based upon the service of the same judge, shall be recomputed and paid as though the child whose annuity was so terminated had not survived the judge.

(g) Questions of family relationships, dependency, and disability arising under this section shall be determined in the same manner as such questions arising under chapter 84 of title 5 are determined.

(h)(1) If—

(A) a judge making an election under subsection (b) of this section dies while in office (i) before having rendered 5 years of civilian service computed as prescribed in subsection (1) of this section, or (ii) after having rendered 5 years of such civilian service but without a survivor entitled to annuity benefits provided by subsection (f) of this section; or

(B) the right of all persons entitled to an annuity under subsection (f) of this section based on the service of such judge terminates before a claim for such benefits has been established, the total amount credited to the individual account of such judge (with interest at 3 percent per year, compounded on December 31 of

each year, to the date of the death of such judge) shall be paid in the manner specified in paragraph (2) of this subsection.

(2) An amount payable under paragraph (1) of this subsection shall be paid, upon the establishment of a valid claim therefor, to the person or persons surviving at the date title to the payment arises, in the following order of precedence:

(A) To the beneficiary or beneficiaries whom the judge designated in writing filed before death with the chief judge (except that in the case of the chief judge such designation shall be filed before death as prescribed by the Court).

(B) To the surviving spouse of the judge.

(C) To the child or children of the judge (and the descendants of any deceased children by representation).

(D) To the parents of the judge or the survivor of them.

(E) To the executor or administrator of the estate of the judge.

(F) To such other next of kin of the judge as may be determined by the chief judge to be entitled under the laws of the domicile of the judge at the time of the judge's death.

(3) Determination as to the surviving spouse, child, or parent of a judge for the purposes of paragraph (2) of this subsection shall be made without regard to the definitions in subsection (a) of this section.

(4) Payment under this subsection in the manner provided in this subsection shall be a bar to recovery by any other person.

(5) In a case in which the annuities of all persons entitled to annuity based upon the service of a judge terminate before the aggregate amount of annuity paid equals the total amount credited to the individual account of such judge (with interest at 3 percent per year, compounded on December 31 of each year to the date of the death of the judge), the difference shall be paid, upon establishment of a valid claim therefor, in the order of precedence prescribed in paragraph (2) of this subsection.

(6) Any accrued annuity remaining unpaid upon the termination (other than by death) of the annuity of any individual based upon the service of a judge shall be paid to that individual. Any accrued annuity remaining unpaid upon the death of an individual receiving an annuity based upon the service of a judge shall be paid, upon the establishment of a valid claim therefor, in the following order of precedence:

(A) To the executor or administrator of the estate of that person.

(B) After 30 days after the date of the death of such individual, to such individual or individuals as may appear in the judgment of the chief judge to be legally entitled thereto.

Such payment shall be a bar to recovery by any other individual.

(i) When a payment under this section is to be made to a minor, or to a person mentally incompetent or under other legal disability adjudged by a court of competent jurisdiction, the payment may be made to the person who is constituted guardian or other fiduciary by the law of the State of residence of such claimant or is otherwise legally vested with the care of the claimant or the claimant's estate. If no guardian or other fiduciary of the person under legal disability has been appointed under the laws of the State of residence of the claimant, the chief judge shall determine the person who is oth-

erwise legally vested with the care of the claimant or the claimant's estate.

(j) Annuities under this section shall accrue monthly and shall be due and payable in monthly installments on the first business day of the month following the month or other period for which the annuity has accrued. An annuity under this section is not assignable, either in law or in equity, or subject to execution, levy, attachment, garnishment, or other legal process.

(k)(1) The annuity of the surviving spouse of a judge making an election under subsection (b) of this section shall be an amount equal to the sum of the following:

(A) The product of—

(i) 1.5 percent of the judge's average annual pay; and

(ii) the sum of the judge's years of judicial service, the judge's years of prior allowable service as a Member of Congress, the judge's years of prior allowable service performed as a member of the Armed Forces, and the judge's years, not exceeding 15, of prior allowable service performed as a congressional employee (as defined in section 2107 of title 5).

(B) Three-fourths of 1 percent of the judge's average annual pay multiplied by the judge's years of allowable service not counted under subparagraph (A) of this paragraph.

(2) An annuity computed under this subsection may not exceed 50 percent of the judge's average annual pay and may not be less than 25 percent of such average annual pay. Such annuity shall be further reduced in accordance with subsection (d) of this section (if applicable).

(3) For purposes of this subsection, the term "average annual pay", with respect to a judge, means the average annual pay received by the judge for judicial service (including periods in which the judge received retired pay under section 4096(d) of this title) or for any other prior allowable service during the period of three consecutive years in which the judge received the largest such average annual pay.

(l) Subject to subsection (d) of this section, the years of service of a judge which are allowable as the basis for calculating the amount of the annuity of the judge's surviving spouse shall include the judge's years of service as a judge of the Court, the judge's years of service as a Member of Congress, the judge's years of active service as a member of the Armed Forces not exceeding 5 years in the aggregate and not including any such service for which credit is allowed for the purposes of retirement or retired pay under any other provision of law, and the judge's years of any other civilian service within the purview of section 8332 of title 5.

(m) Nothing contained in this section shall be construed to prevent a surviving spouse eligible therefor from simultaneously receiving an annuity under this section and any annuity to which such spouse would otherwise be entitled under any other law without regard to this section, but in computing such other annuity service used in the computation of such spouse's annuity under this section shall not be credited.

(n) A judge making an election under subsection (b) of this section shall, at the time of such election, waive all benefits under the civil

service retirement laws. Such a waiver shall be made in the same manner and shall have the same force and effect as an election filed under section 4096(d) of this title.

(o) Whenever the salaries of judges paid under section 4053(e) of this title are increased, each annuity payable from the retirement fund which is based, in whole or in part, upon a deceased judge having rendered some portion of that judge's final 18 months of service as a judge of the Court, shall also be increased. The amount of the increase in the annuity shall be determined by multiplying the amount of the annuity on the date on which the increase in salaries becomes effective by 3 percent for each full 5 percent by which those salaries were increased.

§ 4098. Court of Veterans Appeals Retirement Fund

(a) There is established in the Treasury a fund known as the Court of Veterans Appeals Retirement Fund.

(b) Amounts in the fund are available for the payment of judges' retired pay under section 4096 of this title and of annuities, refunds, and allowances under section 4097 of this title.

(c) Amounts deposited by, or deducted and withheld from the salary and retired pay of a judge under section 4096 or 4097 of this title shall be deposited in the fund and credited to an individual account of the judge.

(d) The chief judge of the Court of Veterans Appeals shall submit to the President an annual estimate of the expenditures and appropriations necessary for the maintenance and operation of the fund, and such supplemental and deficiency estimates as may be required from time to time for the same purposes, according to law.

(e)(1) The chief judge may cause periodic examinations of the retirement fund to be made by an actuary, who may be an actuary employed by another department of the Government temporarily assigned for the purpose.

(2)(A) Subject to the availability of appropriations, there shall be deposited in the Treasury to the credit of the retirement fund, not later than the close of each fiscal year, such amounts as may be required to reduce to zero the unfunded liability (if any) of the fund. Such deposits shall be taken from sums available for that fiscal year for the payment of the expenses of the Court.

(B) For purposes of subparagraph (A) of this paragraph, the term "unfunded liability", with respect to any fiscal year, means the amount estimated by the chief judge to be equal to the excess (as of the close of that fiscal year) of—

(i) the present value of all benefits payable from the fund (determined on an annual basis in accordance with section 9503 of title 31), over

(ii) the sum of—

(I) the present values of future deductions under sections 4096(i) and 4097(c) of this title and future deposits under sections 4096(j) and 4096(d) of this title, and

(II) the balance in the fund as of the close of the fiscal year.

(C) Amounts deposited in the retirement fund under this paragraph shall not be credited to the account of any individual.

(f) The Secretary of the Treasury shall invest from time to time, in interest-bearing securities of the United States, such portions of the retirement fund as in such Secretary's judgment may not be immediately required for payments from the fund. The income derived from such investments shall constitute a part of the fund.

TITLE 5, UNITED STATES CODE

* * * * * * *

PART III—EMPLOYEES

* * * * * * *

Subpart G—Insurance and Annuities

* * * * * * *

CHAPTER 83—RETIREMENT

* * * * * * *

Subchapter III—Civil Service Retirement

* * * * * * *

§ 8334. Deductions, contributions, and deposits

(a) * * *

* * * * * * *

(i)(1) The Director of the Administrative Office of the United States Courts shall pay to the Fund the amount which an employee may deposit under subsection (c) of this section for service creditable under section 8332(b)(12) of this title if such creditable service immediately precedes service as an employee subject to this subchapter with a break in service of no more than ninety working days. The Director shall pay such amount from any appropriation available to him as a necessary expense of the appropriation concerned.

* * * * * * *

(5) Notwithstanding any other provision of law, a judge who is covered by section 4096 of title 38 shall not be subject to deductions and contributions to the Fund, if the judge notifies the Director of the Office of Personnel Management of an election of a retirement annuity under that section. Upon such an election, the judge shall be entitled to a lump-sum credit under section 8342(a) of this title.

* * * * * * *

CHAPTER 84—FEDERAL EMPLOYEES' RETIREMENT SYSTEM

* * * * * * *

Subchapter I—General Provisions

* * * * * * *

§ 8402. Federal Employees' Retirement System; exclusions

(a) * * *

* * * * * * *

(f) A judge who is covered by section 4096 of title 38 shall be excluded from the operation of this chapter if the judge notifies the Director of the Office of Personnel Management of an election of a retirement annuity under that section. Upon such election, the judge shall be entitled to a lump-sum credit under section 8424 of this title.

* * * * * * *

SECTION 401 OF THE VETERANS' JUDICIAL REVIEW ACT

TITLE IV—EFFECTIVE DATES AND APPLICABILITY

SEC. 401. EFFECTIVE DATES.

(a) * * *

* * * * * * *

[(d) BOARD OF VETERANS' APPEALS.—Sections 202 through 207 shall take effect on January 1, 1989.].

(d) BOARD OF VETERANS' APPEALS.——Sections 202, 203, 205, 206, and 207 shall take effect as of January 1, 1989. Section 204 shall take effect on September 1, 1989.

SECTION 12 OF THE DEPARTMENT OF VETERANS AFFAIRS ACT

SEC. 12. MISCELLANEOUS EMPLOYMENT RESTRICTIONS.

(a) * * *

* * * * * * *

(c) PROHIBITED EMPLOYMENT AND ADVANCEMENT CONSIDERATIONS.—(1) Political affiliation or activity may not be taken into account in connection with the appointment of any person to any position in or to perform any service for the Department of Veterans Affairs, or in the assignment or advancement of any employee in the Department.

(2) Paragraph (1) shall not apply to the appointment of *(A)* any person by the President under this Act, other than the appointment of the Chief Medical Director, the Chief Benefits Director, and the Inspector General of the Department of Veterans Affairs, *or (B) any person to (i) a Senior Executive Service position as a noncareer appointee, or (ii) a position which is excepted from the competitive service, on a temporary or permanent basis, because of the confidential or policy-determining character of the position.*

O